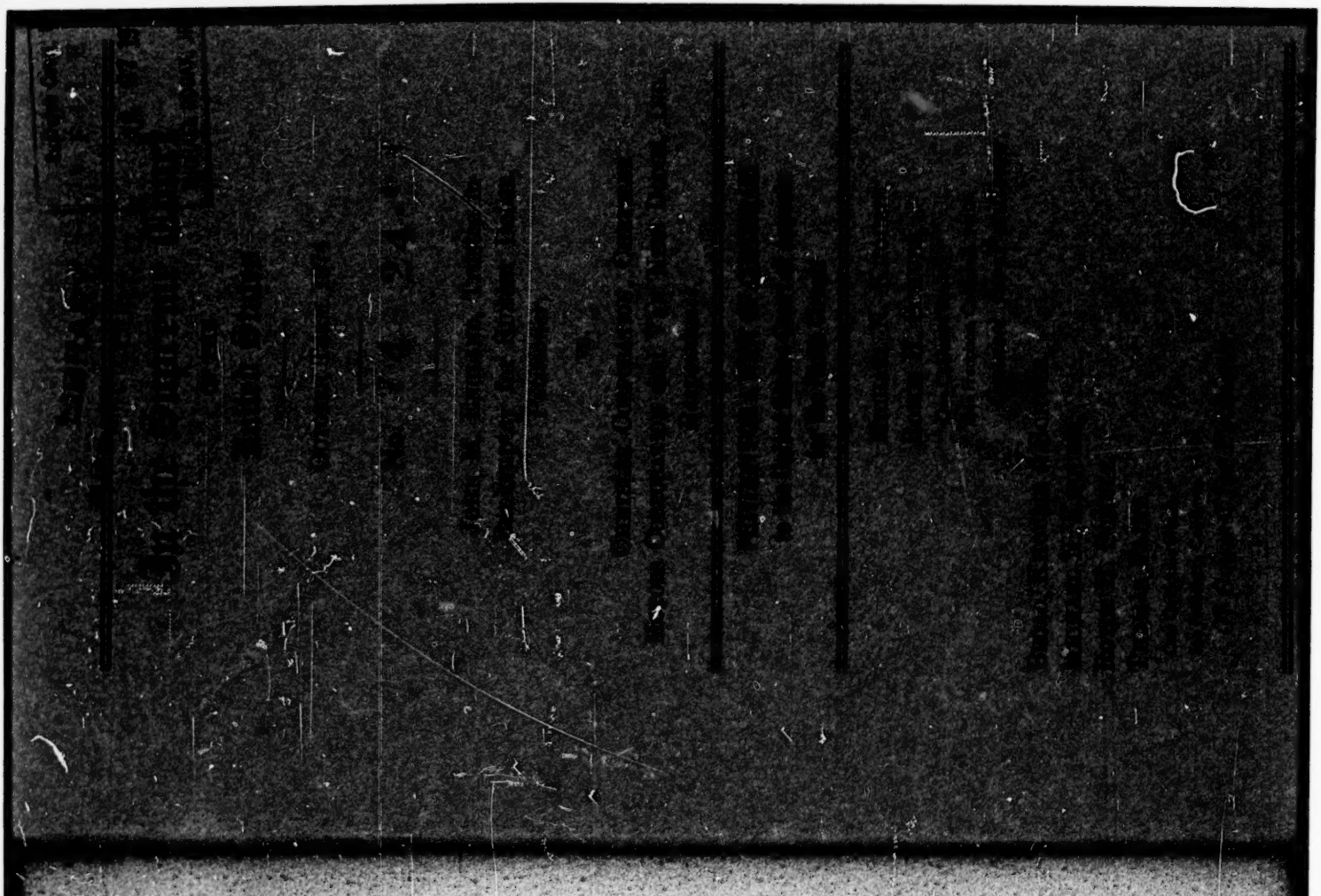

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1974

No.

JOHN M. ENGLAND, Trustee in
Bankruptcy for SUNSET DODGE,
Petitioner,

vs.

CHRYSLER CORPORATION, CHRYSLER
MOTORS CORPORATION and VAN NESS DODGE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner, John M. England, Trustee in Bankruptcy for Sunset Dodge, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals Docket No. 71-2842) entered in the above-entitled case on February 11, 1974. A petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals on May 2, 1974.

OPINIONS OF THE COURTS BELOW

The trial of this case was heard in the District Court for the Northern District of California. On June 4, 1971, following four weeks of trial, the jury returned a verdict of actual damages in the amount of $125,000.00 in favor of petitioner, John M. England[1] and against respondents Chrysler Corporation, Chrysler Motors Corporation and Van Ness Dodge, Inc.

On August 31, 1971, the District Court granted judgment notwithstanding the verdict and, alternatively, a new trial in favor of respondents on the sole ground that the evidence was insufficient to support the jury's verdict. The opinion of the District Court is reported at 1971 CCH Trade Cases ¶73,668 and a copy is attached as Appendix A to this Petition.

On February 11, 1974 the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the District Court. The opinion of Court of Appeals is reported at 493 F.2d 269 (9th Cir. 1974) and a copy is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1974. Sunset filed a petition for rehearing and suggestion for rehearing *en banc*

[1]While Mr. England, as Trustee in Bankruptcy, owns all rights of the bankrupt, Sunset Dodge, asserted in this action, and is therefore the true party-petitioner herein, for the sake of clarity all further references to petitioner will refer to "Sunset" or "Sunset Dodge".

which was denied by the Court of Appeals on May 2, 1974. A copy of the Order denying said petition is attached as Appendix C to this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The sole questions presented by this Petition are:

(1) Did the Courts below in this particular case so completely disregard the standards governing the review of jury verdicts that they render illusory and without substance Sunset Dodge's constitutional right to trial by jury?

(2) Did the District Court's alternative grant of a new trial wipe out Sunset Dodge's constitutional right to trial by jury by ignoring the rules by which new trials are granted and in reality merely give defendants another chance to try the same case?

STATUTES INVOLVED

(1) Amendment VII to the Constitution of the United States (U.S. Const. Amend. VII):

"Amendment VII—Civil Trials

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law."

(2) Section 1 of the Sherman Act (15 U.S.C. §1): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

STATEMENT OF THE CASE

A. Nature of the Case.

This is a private antitrust suit brought by the Trustee in Bankruptcy of Sunset Dodge pursuant to Section 4 of the Clayton Act (15 U.S.C. §15). Sunset alleged that respondents Chrysler, Chrysler Motors, and Van Ness contracted, combined, and conspired to unreasonably restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. §1) and that Chrysler violated Sections 2(d) and (e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. §§13(d) and (e)) by granting preferential allowances and payments to Van Ness which were not made available to Sunset on proportionately equal terms.

The crux of Sunset's claim under §1 of the Sherman Act was that respondents, through the subsidization of uneconomic sales and advertising policies at Van Ness, coupled with sales pressure exerted directly upon Sunset, intentionally depressed the prices and terms of sale of new Dodge vehicles in the San Francisco market, rendering profitable operation of independently-owned Dodge dealerships impossible.

B. Course of Proceedings in the Courts Below.

Sunset filed its complaint on November 16, 1967. On June 4, 1971, at the conclusion of four weeks of trial, the jury returned a verdict for Sunset on its claim under Section 1 of the Sherman Act and awarded actual damages of $125,000. Judgment in accordance with the verdict was entered on June 14, 1971.

On August 31, 1971, the District Court filed its order granting judgment notwithstanding the verdict and, alternatively, a new trial on the Sherman Act conspiracy cause of action. A copy of that order is attached as Appendix D to this Petition. The Court's action was based solely upon its interpretation of the evidence which it decided was insufficient. No legal error, either in the admission or exclusion of evidence, instructions, behavior of counsel, or in the legal theories asserted by Sunset was relied upon in overruling the jury.

The parties had previously stipulated that the Robinson-Patman Act claims could be tried to the Court. On August 31, 1971, the Court entered judgment for respondents on those claims. A copy of that order is attached as Appendix E to this Petition.

On February 11, 1974, the Court of Appeals for the Ninth Circuit affirmed the lower court. Again, the Court's decision rests solely upon the conclusion of the three judges there sitting that the transcript of the record contained insufficient evidence to prove "deliberateness"—that respondents had "deliberately determined upon the *course* of conduct" (493 F.2d,

at 273) which rendered the profitable operation of Sunset impossible.

On May 2, 1974, the Court of Appeals denied Sunset's petition for rehearing and suggestion for rehearing *en banc*.

C. Statement of Facts.

This case arose in the context of a system of dual distribution—the operation of factory-owned automobile dealerships in competition with privately-financed and operated dealerships—maintained by respondent Chrysler in the San Francisco metropolitan market. Chrysler's ownership of Van Ness Dodge was kept secret from Sunset until it had committed and spent its capital (Purcell Tr. 500-501, 577, Cornaglia Tr. 749-750). Dual distribution is a method of marketing in America, which in many cases constitutes a growing threat to independent distributors due to the market leverage held by the manufacturer-distributor. This leverage is particularly severe where intrabrand competition is significant. That leverage may be employed, as it was in the instant case, in the form of a "cost-price squeeze" which exists whenever a manufacturer or distributor of a product, operating on two or more functional levels of distribution, exercises its power to manipulate the price and terms of sale of that product to reduce the profit margin of its independent customer-competitors on the lower level of distribution. The existence of that power depends not upon possession of a dominant or monopolistic position in some larger relevant market, but simply upon control of the supply of the product which is the subject of

the "squeeze". This is so because there existed in this case significant intrabrand competition (Small, Tr. 587-89, 664, 680; Mendelson Tr. 1256-61, 1279-80, 1356-58) and because Sunset was a single purpose business having committed its assets, capital and effort to Dodge products and the Dodge trademark, unaware that Van Ness was owned and subsidized by its sole supplier.

Chrysler is the third largest automotive manufacturer in the United States and manufactures the trademarked Dodge brand of automobiles, trucks, parts, and accessories. The overwhelming majority of Chrysler's revenues and profits are generated at the manufacturing and wholesale level of distribution. (Boyd, Tr. 1166-67). Chrysler Motors is a wholly-owned subsidiary of Chrysler responsible for the distribution and marketing of products manufactured by Chrysler. During the 1960's, Chrysler Motors increasingly engaged in the formation, management and control of partially and wholly owned subsidiaries operating as retail dealers of Chrysler products. (Boyd, Tr. 1165; Venn, Tr. 325).

Van Ness was one such wholly-owned subsidiary which, since May of 1962, operated a Dodge retail dealership in San Francisco. Van Ness was initially capitalized with $300,000 (Pl. Exh. 92 at CR 8105). At its inception, Chrysler Motors anticipated substantial losses during the first three years of its operation. (Pl. Exh. 9-A at 11; Venn, Tr. 394-99). Thus, Chrysler Motors forecasted with an "optimistic viewpoint" and on the "conservative side" (Venn, Tr. 398)

that Van Ness would incur minimum losses of $77,000 in its first year, $39,000 in its second year and would make a slight profit in its third year. (Pl. Exh. 9-A at 11, 23; Venn, Tr. 388-90). A vice-president of Chrysler Motors emphasized to his superiors that these projections were *minimum* losses and that "substantial losses over and above the losses reflected in these forecasts will be incurred . . ." (Pl. Exh. 9-A at 6). Despite these explicit warnings, Chrysler determined to establish Van Ness because the "incremental units" which would be sold justified it in terms of total "take home" to Chrysler. (Pl. Exh. 9-B at 7; Mund, Tr. 1427-30).

History confirmed the optimistic nature of the forecasts. The actual experience through September of 1965 (the month Sunset went out of business) showed a cumulative net loss of more than $649,000, including the loss of approximately $327,000 just for the first nine months of 1965. (Pl. Exhs. 35, 194). Chrysler Motors consistently made capital contributions to offset these mounting losses; by September of 1965 it had contributed more than $949,000 for that purpose. (Pl. Exhs. 35, 94, 318).

Sunset Dodge was a partnership which, from September 10, 1963 to September 22, 1965, operated a privately-financed Dodge dealership located within two and one-half miles of Van Ness. There is intense competition in the retail automobile market, particularly with respect to price and terms of sale (Baughman, Tr. 198). That competition is keenest between intrabrand competitors in close proximity to one

another (Drumm, Tr. 1042), due to "brand loyalty" and the prospective customers' tendency to "shop" nearby dealerships. Thus, the record was undisputed that Van Ness was Sunset's primary competitor in the San Francisco market (Drumm, Tr. 1042; Baughman, Tr. 197-98; Small, Tr. 579-80) and that Sunset had to meet the prices and terms offered by Van Ness. (Mendelson, Tr. 1353-58; Small, Tr. 580, 587-88; Cornaglia, Tr. 800-02; 820).

It was also undisputed that Chrysler, as manufacturer and distributor of Dodge vehicles, was Sunset's only source of supply for the products Sunset had committed itself to sell and service. Consequently, Chrysler was simultaneously Sunset's sole supplier and primary competitor. As a result, during the two years of its operation Sunset had to pay Chrysler's cost for its cars and sell them to the public at prices and on terms Van Ness was selling them. The jury found that Chrysler consciously acted to increase Dodge's market penetration in San Francisco through rigid and inflexible wholesale prices for vehicles (Boyd, Tr. 1183-84; Baughman, Tr. 235) and the uneconomic competition of Van Ness designed to depress the prices and terms at which those vehicles could be resold in the market. (Mendelson, Tr. 1353-57). The result was two dealerships, one of which was subsidized by Chrysler, selling identical products, both losing money because of uneconomic terms of sale and advertising expenditures greater than either could afford to sustain, producing greatly increased market penetration and wholesale profits for Chrysler.

REASONS FOR GRANTING THE WRIT

THE COURTS BELOW HAVE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES THAT THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED

Sunset has been deprived of a jury verdict because the courts below reweighed the evidence and the credibility of the witnesses and decided that *their* inferences and conclusions were more reasonable than those reached by a unanimous jury. The courts below have taken the serious step of preempting the rights of a litigant and assumed the role of nothing less than a fact-finding elite. This approach truly endangers the integrity of the jury system and requires the exercise of this Court's supervisory powers to vindicate the role of the jury in the enforcement of the antitrust laws. We believe a real danger, certainly the appearance of a real danger, exists. Recently, trial and appellate courts throughout the country have exhibited a growing tendency to overturn jury verdicts in private antitrust cases. Without arguing the propriety or impropriety of the results in any other case, Sunset respectfully submits that there is a pressing need for a clear and definitive restatement of the standards of review and the degree of deference to which a jury verdict is entitled.

This case presents an ideal opportunity for such a restatement because only the alleged insufficiency of the evidence to support the verdict was raised and relied upon by both of the lower courts. This antitrust case presents no legal errors—not even evidentiary rulings are challenged. The courts below simply

disagreed with the unanimous judgment of twelve unbiased men and women, who followed the court's unchallenged instructions, as to which inferences, concerning the purpose or intent of the respondents, were most reasonably supported by the evidence. In doing so, the courts fragmented and dismembered Sunset's proof, considered whether each isolated practice, standing alone, was sufficient to prove a violation and then "wiped the slate clean" and examined the next practice. Inferences reasonably drawn from the totality—the "whole picture"—of respondents' conduct were rejected by the courts below as unsupported by the various ssgments of the evidence. This approach is wrong, and patently so where no legal errors are alleged to have occurred and the disagreement concerns proof of such elusive issues as intent or "deliberateness". The result was to deny Sunset the legitimate benefits of trial by jury.

This Petition is filed because Sunset believes it does not have to accept as proper judicial conduct what has occurred in this case. Sunset has respect for the judicial system of this country and for the judges involved in this case. But their actions here tend to create in the minds of those in the legal profession and non-lawyer citizens alike the impression that the judiciary is a world unto itself, unaccountable to the rule of law and, on the other side, that the jury system is illusory.

Many citizens, we submit, both with and without the advice of counsel, would prefer to have juries rather than judges make determinations of facts and

judge credibility in their legal disputes with others. The law gives them this choice, and the exercise of that lawful choice must be free from judicial interference. Yet, it is the judiciary itself that must preserve and protect that right. We respectfully argue that judicial restraint must be exercised at all levels of the system and that judges must as jealously protect the citizens' prerogative to jury trial as the integrity of the judiciary. Both are part of the system.

If lower courts are in doubt or where, as here, they disregard their role concerning a jury verdict, this Court should clarify and emphasize what that role is. This Court's supervision is also necessary in order to provide litigants, through their counsel, a rule of law as to the strength and reality of a jury's factual findings.

We submit that the "all favorable inferences" rule should be a forceful and, indeed, living basic premise. All courts should bend over backward to apply it. We believe this Court should announce as a rule that judges, both trial and appellate, should be extremely hesitant before acting to disturb a jury's factual determinations. The failure of proof should be clear and convincing and the injustice done should be manifest. We respectfully submit that judges—as lawyers—are no better equipped to decide facts and judge credibility than jurors and if jurors are properly instructed, as they were in this case, any injustice done by their verdict should be manifestly clear before courts can or should intervene in the jury's exclusive area.

THE COURTS BELOW HAVE REFUSED TO CONSIDER ALL OF THE EVIDENCE AND GRANT SUNSET THE BENEFIT OF ALL INFERENCES SUPPORTED THEREBY

Section 1 of the Sherman Act proscribes all combinations which have the effect of unreasonably restraining trade regardless of the intentions of the actors. The Court of Appeals imposed an additional burden on Sunset by requiring proof of "deliberateness", proof that the respondents willfully and consciously embarked upon a course of conduct, the inevitable result of which was an unreasonable restraint of trade. While Sunset believes this additional requirement of "deliberateness" finds no support in the law, it was clearly met by the evidence in this case.

Issues of intent or deliberateness are seldom susceptible of direct proof, particularly in antitrust litigation. They must normally be proven by inference from circumstantial evidence. Thus, a person is presumed to know and to intend the natural and probable consequences of his actions. So much was conceded by the Court below when it stated that Chrysler's conduct would be deliberate and therefore violative if it could be inferred that "Chrysler determined to manage Van Ness regardless of retail profit." (493 F.2d, at 273). The Court, however, then dismisses without discussion all of the evidence which supports such an inference and states ". . . All of the evidence demonstrates that Chrysler *wished* the dealer to be successful." (493 F.2d, at 274; emphasis added). In reaching this conclusion the Court of Appeals separately considered five factual issues. In each case,

the Court adopted the respondents' contentions regarding the substance and weight of the evidence and rejected inferences and conclusions drawn by the jury. The following argument sets forth the substantial evidence in the record which contradicts the inferences and conclusions drawn by the Court of Appeals on each of those five issues.

(1) Proof That Van Ness Was Operated Without Regard to Profits

The Court states that Chrysler consistently attempted to correct admittedly "unwise" selling practices. The Court ignored large and significant parts of the record. While Chrysler undoubtedly would have preferred to minimize retail losses at Van Ness, the record clearly demonstrated that whenever this objective conflicted with the aim of increasing sales volume, the latter prevailed. Thus, Chrysler anticipated substantial losses at Van Ness during its first three years of operation (Pl. Exh. 9-A at 11). The forecasted losses were recognized to be minimum losses, (Pl. Exh. 9-A at 6), and Van Ness lost much more than projected and for a far longer period of time. (Pl. Exhs. 35, 94, 318). The losses incurred at Van Ness were the direct result of the profligate advertising and sales policies at the dealership; and, despite the alleged attempts of Chrysler to correct these policies they worsened rather than improved, culminating in 1965 in the loss of $359,314, the expenditure of 32.8% of total *gross* profits at Van Ness just for advertising, and the destruction of Sunset. (Pl. Exhs. 34, 42-46, 48, 49).

Continuous operation at a loss has consistently been held to support an inference of predatory intent, even in cases where dual distribution did not exist. Nonetheless, the Court of Appeals held that the only permissible inference arising from Chrysler's operation of Van Ness was that it was principally concerned with retail profitability at Van Ness. Given Chrysler's complete control over the operation of Van Ness, it is difficult to believe that Chrysler was incapable of changing the sales and advertising policies at the dealership during a period of five and one-half years of loss operations, if it truly desired to do so. Clearly, the jury was not required, as a matter of law, to believe it. Nor was the jury required to believe that a corporation capable of operating a world-wide manufacturing and distribution system profitably (Pl. Exhs. 51-55) was incapable of operating a retail dealership at a profit.

The jury was entitled to infer that some other consideration, i.e., wholesale profits generated by two-dealer market penetration, dictated and justified the manner in which Van Ness operated. Cogent evidence supporting that inference was the 1964-65 contract for, and payment of, substantial bonuses to the manager of Van Ness based solely on the number of new vehicles sold, regardless of profitability. (Pl. Exhs. 44 at CR 7910-11, 72, 81). The Court of Appeals took no account of this evidence and therefore it was not accorded the consideration the law requires.

(2) Proof of Countervailing Wholesale Profits

The Court of Appeals stated that proof "that it would be profitable for Chrysler to operate Van Ness at a loss because sales to Sunset and Van Ness would produce wholesale profits that would exceed that loss" would support an inference of deliberateness but that Sunset had failed to prove this fact. (493 F.2d at 274). Here again the Court took no account of such evidence and therefore did not accord that evidence any weight or attempt to analyze what, if any, inferences were supported thereby. Once again the Court only discussed evidence from which an inference might arise to support the Court's, not the jury's, conclusion.

There was direct evidence in the record concerning the existence of offsetting wholesale profits in the context of two-dealer market penetration. Thus Mr. Boyd, vice-chairman of Chrysler's Board, testified concerning the factory-owned Oakland Truck Center which was "administered by the Dealer Enterprise office in a manner consistent with the Dealer Enterprise program for automobile dealers" (Boyd, Tr. 1201). That retail truck operation lost approximately $954,000 in 1965 (Boyd, Tr. 1207-08). These retail losses, however, were offset by incremental profits at wholesale due to the additional units sold which approximated $900,000 (Boyd, Tr. 1209, 1212-13). Thus, huge losses at retail were almost counterbalanced by wholesale profits generated within a single dealership. In the context of two-dealer market penetration, the losses incurred in the retail operation of Van Ness would be more than offset by the wholesale profits

generated from the increase in sales at Van Ness *and* Sunset, forced by the competition of Van Ness to emphasize volume sales. Only the losses at Van Ness were subsidized by Chrysler. Due to the trust receipts form of financing used in retail automotive distribution, Chrysler received payment in full for all vehicles sold to Sunset prior to delivery. (Pl. Exh. 102 ¶12, Mund, Tr. 1497). All losses on the resale of *those* vehicles had to be borne entirely by Sunset.

Additionally, there is no legal requirement that such wholesale profits be received to explain the use of a cost-price squeeze to force greater market penetration. Chrysler derived most of its income from the sale of vehicles at wholesale. (Boyd, Tr. 1166-67). There was evidence that many vehicles manufactured were difficult to sell and that distribution of those vehicles was obtained only by pressure and quotas within the sales organization of Chrysler Motors (Baughman, Tr. 171-72; Drumm, Tr. 1035-36) and exerted against independent dealers (Cornaglia, Tr. 775). Those vehicles, once manufactured, had to be sold. Even if profits at wholesale were not sufficient to completely cover losses at retail, Chrysler's over-all profits would be greater than if these vehicles were not sold at all. The jury was entitled to infer that Chrysler would not continue the operation of Van Ness at tremendous losses for a period of five and one-half years unless it was receiving compensating benefits. That inference is reasonable and supported by the evidence; nonetheless, the courts below held that the only reasonable inference was that Chrysler

was not deliberately using the retail loss operation to impel two-dealer market penetration.

(3) Proof of Volume Forcing—Misdelivered Shipments

In one paragraph the Court of Appeals dismissed as irrelevant evidence concerning the delivery of huge numbers of unordered vehicles to Sunset.[2] These deliveries of over 230 vehicles were characterized by the Court as evidence merely that Chrysler "overzealously sold cars to Sunset" (493 F.2d, at 274) and not germane to the reckless operation of Van Ness. This conclusion demonstrates the Court's total rejection of the factual determination of the jury that the impact of dual distribution in this case arose not only from subsidized unfair competition at retail, but more importantly from such unfair competition coupled with the absolute control over wholesale supply. At the wholesale level, forcing the purchase of cars through pressure, quotas and delivery of unordered vehicles are evidence, together with evidence of Van Ness' operation, of a plan to use Sunset's capital and effort to increase market penetration. Such evidence was highly relevant to the determination of whether

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[2]Two egregious examples of this practice were testified to in detail. The first occurred in January 1965 and involved delivery of approximately 115 cars. (Small, Tr. 541). The second occurred in July 1965 and involved delivery of 119 cars. (Cornaglia, Tr. 793, 804, 811). Both shipments were received during poor sales periods of the model year, and, due to the "flooring" method of financing, all vehicles were automatically paid for upon shipment. Thereafter Sunset asked Chrysler to stop sending its monthly allotments of 50 cars, but Chrysler did not stop. (Cornaglia, Tr. 786-87).

Chrysler's purpose was to impel two-dealer market penetration. The Court of Appeals simply ignored it.

(4) Proof of Use of Advertising to Force Sunset to Sell Cars at Van Ness' Prices and Terms, Thus Increasing Chrysler's Market Penetration

On this point the Court of Appeals concluded that "supposedly excessive advertising expenditures" (493 F.2d, at 274) could not support an inference of deliberateness. Here again the Court dismembers Sunset's proofs, fails to consider it as a whole and rules on each of many practices as if Sunset were claiming each to be a separate violation rather than considering Chrysler's conduct as a whole and then determining whether the conclusion drawn by the jury was one, perhaps of several, which reasonable men could reach.

The Court acknowledged evidence that at its inception, Sunset planned to spend less on advertising than it ultimately spent but was forced to spend more due to the massive advertising conducted by Van Ness. The Court then states that Sunset failed to prove that Van Ness' advertising expenditures in September 1963 were out of line either with its own prior practices or the practice of other dealerships in San Francisco. The Court here overlooks Sunset's evidence which shows that Van Ness's advertising budget for its first year of operation was $41,760 or $3,480 per month (Pl. Exh. 9-A) and that during this period Van Ness was spending more for advertising than any other Dodge dealer in the San Francisco Bay Area (Pl. Exh. 135 at CR 7704). In Sep-

tember 1963, the month Sunset commenced operation, Van Ness spent $6,800 just for new vehicle advertising. (Defts' Exh. CCCCC).

The Court then concludes that the evidence of excessive advertising relates solely to the post-April, 1964 operation of Van Ness and concludes that these advertising expenditures, conceded to be "unusually high" and "profligate" could not constitute substantial evidence of the operation of Van Ness reckless of retail profitability. (493 F.2d, at 274).

The evidence, however, shows that "general" or institutional advertising was properly includible in new car advertising because it had a direct and substantial effect on new car sales (Mendelson, Tr. 1253-55). When included, Van Ness's advertising expenditures per new unit sold at retail were consistently almost double those of Sunset throughout its existence:

Year	*Sunset*	*Van Ness*
Sept. 1 to Dec. 31, 1963	$ 62.00	$ 110.00
1964	67.00	128.00
1965 (January through September)	84.00	160.00

(Def. Exh. IIII; Pl. Exh. 265)

Even considering new vehicle advertising without the addition of general advertising, Van Ness consistently spent more than Sunset:

Year	*Sunset*	*Van Ness*
Sept.-Dec. 1963	$ 3,880	$ 4,498[3]
Calendar 1964	5,544	7,545
Jan.-Sept. 1965	5,505	7,129

(Pl. Exh. 265)

By 1965, Van Ness was spending more than 32% of its total gross profits just on advertising. (Pl. Exh. 34; Mendelson, Tr. 1368-69). The Court below dismisses these facts as merely a "few months of profligate promotional spending."[4] There was no internal economic justification for such massive expenditures, which were only possible due to Chrysler's willingness to underwrite all losses at the dealership. Even a few months of profligate advertising, however, is enough to support an inference of deliberateness in the context of dual distribution and the

[3]It surely seems beyond the scope of the law that the Court of Appeals should use as justification for its conclusion that Sunset was the initiator of excessive advertising, evidence that "each dealer spent an average of approximately $4500 per month (September 1963-April 1964) on new car advertising". (493 F.2d at 274). This may be true, but the evidence introduced and obviously accepted by the jury was that when in September of 1963 (the month Sunset commenced its business) Sunset spent $2,361 (almost all of which was an allowance by Chrysler), Van Ness spent $6,800. When greeted with this unexpected event, Sunset determined it would have to increase its new car advertising expenses to meet Van Ness's (Small, Tr. 583, 650-56). The jury believed this testimony and the Court of Appeals has no call to arrive at the contrary conclusions either that Sunset started the upward advertising spiral or that because for the eight-month period the "average" expenditures were the same, Sunset deliberately or willingly planned and perpetuated an advertising program equal to or in excess of that planned and executed by Van Ness.

[4]Presumably the Court is referring to the eight-month period, May to December, 1964 during which Van Ness spent $72,000 while Sunset spent $43,000. (Pl. Exh. 305). Absent the "deep pocket" of Chrysler such profligacy would be impossible.

jury is entitled to so find for a litigant who chooses to have his dispute factually determined by a jury. The impact of such advertising expenditures was two-fold: It forced Sunset to spend more for advertising than was otherwise justified and it introduced and publicized the uneconomic terms of sale offered at Van Ness—which Sunset was also forced by market conditions to meet. The jury was entitled to conclude that those market conditions, created and manipulated by Chrysler, caused the failure of Sunset.

(5) Proof of Sales Below Cost and on Uneconomic Terms

The Court below adopted respondents' contention that actual gross profits per new unit sold at retail[5] were greater at Van Ness than at Sunset and concluded that there was no evidence that Van Ness depressed prices or terms of sale in the San Francisco market. (493 F.2d, at 274). Because there was competent evidence directly to the contrary, the Court of Appeals had no right to overrule the jury on this point.

Van Ness was selling new cars below its cost on a consistent basis from the beginning of its existence through the time Sunset went out of business. The

[5]Here the courts below totally rejected Sunset's testimony that the gross profits were composed of the amount allowed on trade-ins, "side-notes" and "pick up charges". These amounts according to Sunset's accountant were "overstated" and "illusory" and thus overstated the gross profits on new car sales of Van Ness. The jury must be presumed to have believed this, yet the Court of Appeals accepted as a basis for its finding of fact to the contrary, the figures presented by Chrysler's exhibit which were merely taken off of Van Ness' books, without adjustment for overallowances and other overstated and illusory receipts. (493 F.2d at 274).

books and records of Van Ness showed that from 1962 through 1967 Van Ness operated at substantial losses in its over-all operations, in its new vehicle department and on a per new unit sold at retail (PNUR) basis. (Pl. Exhs. 42-49). No evidence ever disputed this. Furthermore, Van Ness' average gross profit on new car sales, from which net profits were computed, was overstated, unreliable and illusory because Van Ness failed to charge to the new car department large write-downs and trading adjustments made in the used car department necessitated by the consistent practice of granting over-allowances on trade-ins. (Mendelson, Tr. 1762-66, 1770-71, 1774). Further distortion was caused by the accounting practice of showing "side-notes"—never collected and later written off as bad debts—as part of the down payment received at the time of sale (Pl. Exh. 89). Additionally, losses suffered due to repossessions were never reflected in Van Ness's new vehicle department (Mendelson, Tr. 1329). Accordingly, the conclusion reached by the Court below is against the only evidence in the record which accurately explained Van Ness's bookkeeping. Chrysler did not even present an accountant or have any testimony concerning the reliability of its new car gross profits. We respectfully submit that it is beyond the scope of the authority of the Court of Appeals to reject the jury's conclusion that Van Ness overallowed, didn't adjust, and that its gross profit figures were overstated.

The evidence is that there is a direct relationship between the dollars lost per unit repossessed and the

true value of the down payment. (Mendelson, Tr. 1276-79). The losses on repossessed units at Van Ness during the years 1964 and 1965 averaged $379 and $604, respectively, compared to Sunset's average losses of $48 and $177 for the same years. The only reasonable conclusion (a burden which Sunset does not have to sustain on appeal) was that Van Ness had made many more "thin" deals with negligible down payments than Sunset. (Mendelson, Tr. 1276-79). The "Major"[6] analysis of repossessions at Van Ness (Pl. Exh. 280) supported Mr. Mendelson's conclusion that the change in Van Ness' sales strategy occurred in late 1963 or early 1964 and caused Sunset to adopt those policies. (Mendelson, Tr. 1278).

The Court below seems to find as a factual matter that it was not Van Ness which initiated the practice of selling on uneconomic terms. Analysis of repossessions at the two dealerships, however, proves that this is not true. (Pls. Exhs. 270, 280, 293-94; Mendelson, Tr. 1276-79). Despite this evidence and a favorable jury verdict, however, the Court concludes that Chrysler's conduct could not be deliberate because it attempted to correct these "ill-advised business policies" at Van Ness. (493 F.2d, at 275). The fact is that these practices were not corrected, but rather worsened over time. Chrysler's own auditor of Van Ness while identifying and seeking to remedy the "ill-advised business policies" recognized that some other persons at Chrysler felt such policies had to be fol-

[6]Mr. Major was an internal auditor for Chrysler who made a written and damning analysis of Van Ness' sales practices. (Sunset Exh. 280).

lowed to obtain market penetration (Pl. Exh. 280). Mr. Major's memorandum is clear evidence that there were two different aims, either one of which could be the dominant business philosophy at Van Ness. One was to run a profitable dealership and the other to attain market penetration and sacrifice retail profitability. The evidence is clear and the jury could at the very least infer that Chrysler opted for the latter. Mr. Major acknowledged this.

> "*[i]t will be argued that a certain amount of questionable deals must be taken, if sales are to expand.* That is also true. However, questionable deals here equal to 38.5% or nearly 4 times the normal 10% *is inviting disaster.*" (Pl. Exh. 280; emphasis added).

It was about the time of this report that Chrysler contracted for and paid a substantial bonus to Van Ness' manager during 1964 and 1965 based upon the number of new cars sold and not upon the profitability of the new car department or the dealership's profitability (Pl. Exh. 81). Losses increased after Mr. Major's report to Chrysler. The result was the expenditure of 32.8% of gross profits on advertising (Pl. Exh. 34); losses for the year of 1965 in the amount of $359,314 (Pl. Exh. 45), repossession of 98 vehicles sold as new at an average loss of $604 per vehicle (Mendelson, Tr. 1276-79), greatly increased market penetration, and the destruction of Sunset. The jury reasonably concluded that Chrysler adopted a course of conduct designed to maximize the sale of Dodge vehicles in San Francisco regardless of the impact of that policy upon the retail profit-

ability of either Van Ness or Sunset. That conclusion is supported by substantial evidence and its rejection by the Courts below constitutes a clear abuse of judicial power and discretion.

THE CONDITIONAL ORDER GRANTING A NEW TRIAL WAS ERRONEOUS

Substantial evidence supports the jury's verdict and, therefore, the order granting judgment notwithstanding the verdict should be reviewed and reversed. Although no legal errors occurred during or in connection with the trial, the District Court also granted a conditional new trial to respondents. In doing so the Court simply disagreed with the inferences and conclusions drawn by the jury in resolving conflicts in the evidence and judging the credibility and weight of the evidence submitted by the parties. Every argument relied upon by the Courts below was forcefully made to and rejected by the jury.

Granting that motions for a new trial are addressed to the sound discretion of the trial court, nonetheless the verdict of a jury should not be set aside unless it is against the great weight of the evidence. Defendants are not entitled to a second trial when the first one was fair and there is no reason to believe that different laws or evidence will be applicable. Judges do not and should not have such uncurbed power. The verdict in this case was supported by a preponderance of the evidence and should be reinstated. The respondents made a tactical decision not to present any affirmative evidence on their

behalf, choosing instead to rely on efforts to discredit Sunset's witnesses and documents. Throughout the trial respondents emphasized the dishonesty of Messrs. Small and Cornaglia, the principals of Sunset Dodge. The respondents strenuously argued to the jury that it was this dishonesty and the alleged inadequacy of capital at Sunset which led to Sunset's failure rather than anything done by respondents. The jury was properly instructed to consider all of these issues. (Instructions Tr. 1957, 1959-60) and resolved them in Sunset's favor.

All parties had a full opportunity to present evidence and argument in support of their position and the jury returned a reasonable verdict based upon that evidence. There is absolutely no reason to believe that the outcome of a second trial would be any different and such a retrial will simply impose additional expense and burdens upon the parties and the court. Under these circumstances a new trial is neither necessary nor justified. Justice will be promoted by the reinstatement of the verdict.

CONCLUSION

In this case, the Court of Appeals virtually concedes the evidence gives rise to inferences of "overzealous selling practices", "ill-advised business policies", "unwise selling practices", and "profligate promotional spending" on the part of Chrysler, yet it reins the jury to its own concept of these factual matters and will not permit a finding of "deliberateness"

to "impel two dealership penetration." The Court of Appeals has found that the entire body of evidence cannot support an inference of "intentional mismanagement" of a dealership to impel market penetration for the manufacturer, but finds instead that the sole reasonable inference was that the practices were the "product of healthy competition." The Court of Appeals concedes the question to be difficult, yet when the jury made the determination, the Court rejected it.

We can only argue strenuously that the role the courts below have assumed in making such findings on this record is contrary to law and justice as perceived in our nation. Thus we earnestly pray that this Court review that role under its supervisory powers. This Petition should be granted.

Dated, San Francisco, California,
July 29, 1974.

Respectfully submitted,
MICHAEL N. KHOURIE,
ROYCE H. SCHULZ,
Counsel for Petitioner.

BROAD, KHOURIE & SCHULZ,
MICHAEL N. KHOURIE,
ROYCE H. SCHULZ,
THOMAS PAINE,
Of Counsel for Petitioner.

(Appendices Follow)

Appendix A

United States District Court
Northern District of California

No. 48240

John M. England, Trustee in Bankruptcy for Sunset Dodge, A Partnership Composed of Stanley Small and Steve Cornaglia,
Plaintiff,

vs.

Chrysler Corporation, Chrysler Motors Corporation, Van Ness Dodge, Inc.,
Defendants.

[Filed Aug. 13, 1971]

MEMORANDUM OF DECISION

SWEIGERT, J.

After trial and a jury verdict in favor of plaintiff (in the amount of $125,000, subject to trebling by law to $375,000), this civil private antitrust action is now before the Court on defendant's motions for judgment notwithstanding the verdict or a new trial.

The Court has carefully re-examined the evidence, not only in the light of the briefs and oral argument on these motions, but also in the light of a review of the transcript of the trial, to test the misgivings and reservations with which the Court, after deny-

ing defendant's motions for a summary judgment under Rule 56, F.R.Civ.P., and for a directed verdict under Rule 50(a), F.R.Civ.P., submitted the issues to a jury under Rule 50(b), F.R.Civ.P.

This further examination has confirmed the view of the Court that the evidence is so insufficient to support the verdict, and the verdict so contrary to the weight of the evidence, that in any event a new trial should be, and is, hereby ordered.

The Court has reached the further conclusion that the evidence on the issues is wholly insufficient, or at least so insubstantial and lacking in probative value, that there is no evidence whatsoever from which the jury might rationally have concluded that defendants, in combination or otherwise, restrained trade, unreasonably or otherwise, or injured the business of plaintiff's bankrupt; that defendant's motion for a directed verdict in defendant's favor should be, and is, hereby ordered with the alternative provision that, in the event such order should for any reason be set aside or reversed on appeal, the order for a new trial of the issues, unless also set aside or reversed on appeal, shall remain in effect. (See Rule 50(c), F.R. Civ.P. and *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957).

The Court is mindful that the test for the propriety of judgment notwithstanding the verdict is whether in this case, disregarding conflicting evidence in favor of the defendant and giving to plaintiff's evidence all the value to which it is reasonably entitled and indulging every reasonable inference fa-

vorably to plaintiff, there is evidence of sufficient substantiality and probative value from which the jury might rationally find a verdict in favor of plaintiff.

The verdict of a jury should not be lightly set aside, nor should a new trial be lightly granted—[illegible]inly not for the mere reason that the Court may [illegible] with the verdict. However, in this case, the [illegible] is convinced that this verdict for plaintiff, if allowed to stand, would be extremely unfair to defendant, would be a legally unjustified windfall to the plaintiff, and would be, in the opinion of the Court, a miscarriage of justice.

In fairness to the jury, the Court notes its view that the length of the trial, the numerous exhibits, the technical, complicated subjects, and various plausible but specious considerations contributed, understandably, to a jury verdict rendered from the heart instead of the head.

The law contemplates, however, that in such circumstances the Court will measure up to its responsibility for acting in accordance with its considered evaluation of the record.

The Court is also mindful of the importance of the antitrust laws and the salutary effect in the public interest of enforcement thereof by private civil suits for triple damages—discouragement of overreaching anti-competitive practices by large corporations to the detriment of smaller business consumers and the public generally. However, even large corporations are entitled to protection by the Courts against occa-

sional, inexplicable and errant verdicts rendered under circumstances of this kind.

Although a complete, detailed review of the evidence would unreasonably lengthen this memorandum, we believe that in fairness to counsel and to any appellate tribunal, we must at least summarize the reasons which have led to this conclusion.

The evidence is to the effect that Chrysler distributes its automobiles nationwide through several kinds of dealerships: (1) dealerships wholly owned by others, for example, Sunset in this case; (2) dealerships partly owned by Chrysler and partly by others, so-called D.E. dealerships; and (3) dealerships wholly owned by Chrysler, called contractual dealerships, e.g., Van Ness in this case.

These latter contractual dealerships, although wholly owned by Chrysler, contain contractual provisions through which their managers, accumulating sufficient funds to do so, may acquire part ownership with Chrysler and thus become co-proprietors in what would then be a D.E. dealership.

There is no dispute about the fact that Chrysler Corporation, the manufacturer of Dodge cars, and Chrysler Motors, its wholesale distributor, had contracts between themselves and with various Dodge dealers, including Van Ness Dodge, their wholly owned retail dealer here, which resulted in what is sometimes called a "dual distribution," meaning a distribution system under which Chrysler distributed its cars in San Francisco and environs through both

Sunset, a privately owned dealership, and Van Ness, a Chrysler owned dealership.

The basic issue in the case is whether this contractual arrangement between defendants was in restraint of trade within the meaning of Section 1 of the Sherman Act.

There is no serious contention that this kind of contractual combination constitutes in and of itself a *per se* restraint of trade. Indeed, plaintiffs withdrew their originally requested instructions to that effect.

Conceivably such an arrangement, involving a dual distribution system, may be perfectly lawful and under certain circumstances an aid to competition rather than a restraint upon it. For example, an automobile manufacturer, even though desiring and preferring to distribute through wholly privately owned dealerships, may not always be able to find a qualified dealer for a location at which the manufacturer must, nevertheless, maintain a dealership in order to meet the competition of dealerships of other automobile manufacturers in that area. Under these circumstances, maintenance of a dealership by the manufacturer, notwithstanding only a remote expectation of profits, rather than abandonment of the site, would maintain a competition that would otherwise have been eliminated.

The only issue, therefore, is whether this kind of contractual combination, as it was operated by the Chrysler Companies and Van Ness in this particular

instance, did in fact constitute an unreasonable restraint of trade which injured Sunset in its business.

THE EVIDENCE

After careful re-examination of the evidentiary record we have confirmed our belief, tentatively reached earlier, that there is no substantial evidence upon which a jury or court could support such a finding.

(1) There is no evidence from which the jury could rationally infer that the contractual combination of defendants was anti-competitive in its purpose, i.e., designed by Chrysler to restrain competition by destroying Sunset—its own Dodge dealer.

On the contrary, the evidence is wholly to the effect that in April, 1962, one and one-half years before establishment of Sunset, Chrysler's previous privately-owned dealership on San Francisco's Van Ness Avenue surrendered its dealer franchise; that Chrysler, considering it to be vital to maintain Dodge dealership on San Francisco's "automobile row" in order to meet competition of other car dealerships in that area and not having any private dealer available for the site, established Van Ness as a contractual, wholly Chrysler owned dealership; that the previous dealer, J. E. French Company, had been operating at a heavy loss and Chrysler expected Van Ness would be profitable only after three years of corrective management; that Chrysler thereafter consistently took corrective action to eliminate or reduce Van Ness losses; that, meanwhile, Chrysler expected to and did make up Van Ness losses with capital contributions enabling it to continue operating.

The evidence is also to the effect that in September, 1963, when Sunset became a Chrysler dealer, Chrysler made no misrepresentation to Sunset concerning Chrysler's ownership of Van Ness; that both Sunset partners were long experienced and knowledgeable in the operation of automobile retail dealership in the San Francisco area; that during virtually all of Sunset's operation, its partners knew that Van Ness was Chrysler owned; that Chrysler's attitude toward Sunset was not to see it carried away with unit volume, but rather to help the partners stay in business; that, according to the testimony of the Sunset partners themselves, Chrysler was always encouraging and helpful; that Chrysler did in fact help Sunset, for example, in connection with enlargement of its used car lot and the processing of its belated applications to Chrysler for financial assistance through a D.E. dealership; also through a Chrysler Credit line of credit extended to Sunset in 1965 when Sunset's bankers were pressing it; that during their two year operation of Sunset, its partners never made any complaint to anyone, even Chrysler, that Van Ness was unreasonably restraining their ability to compete or was otherwise the cause of their financial difficulties and eventual failure; that, on the contrary, whenever Chrysler expressed concern about Sunset's financial condition, its partners systematically misrepresented its condition as being much better than it actually was, concealing its true condition from Chrysler and also from Sunset's bank by submitting false statements to them; that in early 1965, when Chrysler expressed concern about the adequacy of

Sunset's capital, the partners, assuring Chrysler that they would put more capital into the business, pretended by a trick and device to put $30,000 into it but actually failed to do so; that in the summer of 1965, when Chrysler again expressed concern over Sunset losses, the partners again pretended by a trick and device to add $5,500 to the business but never actually did so.

(2) There is no evidence from which a jury could rationally infer that the contractual combination of defendants, whether designed to do so or not, was actually anti-competitive in its effect, i.e., that it, in fact, unreasonably, or at all, restrained trade or thereby caused injury to Sunset's business.

On the contrary, the evidence is wholly to the effect that at the times in question (1963, '64, '65) Van Ness was only one of 65 retail automobile dealers in San Francisco and its environs; that it sold only about 1% of all new cars sold in that market; that it retailed only about 20% of all *Dodge* automobiles in that market; that, on the other hand, Sunset itself retailed over 30% of the Dodges sold in that market during the period, selling substantially more new Dodges than Van Ness in each of those years.

There is no evidence from which a jury could rationally infer that Chrysler's resources were used by Van Ness to undercut, exploit, or destroy Sunset, its own Dodge dealer, by driving down Sunset's prices or otherwise.

On the contrary, the evidence is wholly to the effect that Van Ness markups, i.e., its retail gross price

per new car unit retailed, remained virtually unchanged ($378-386) during the period and, further, that Sunset's markup consistently set a pattern for undercutting Van Ness by $33 per car in 1963, $38 per car in 1964, and $43 per car in 1965.

(3) There is no evidence from which a jury could rationally infer that Chrysler's resources were funnelled into Van Ness pursuant to a combination between them to squeeze the profit out of Sunset by driving it to so called "thin deals" in order to sell its cars.

On the contrary, the evidence is wholly to the effect that Sunset, itself, set the patterns for advertising and accepting so-called easy terms, so called "thin deals" (involving correspondingly great risk of eventual repossession from the very start of its business in September, 1963; that, as would be expected under such circumstances an abnormal repossession rate began to show in about the summer of 1964; that, on the other hand, Van Ness did not even *start* any such easy term thin-deal policies until about the summer of 1964 and then, presumably, [illegible]et the competition of Sunset, its nearest competitor; that, not only did Sunset commence such a thin-deal policy before Van Ness, but also it made more of such thin-deals than Van Ness—as indicated by its high repossession rate as compared with Van Ness, i.e., Sunset repossessions in 1964—36 (Van Ness 26); Sunset repossessions in 1965—55 (Van Ness 29).

(4) There is no evidence from which a jury could rationally infer that Chrysler's resources were used

by Van Ness to pressure Sunset by means of advertising expenditures as alleged by plaintiffs.

The evidence is wholly to the effect that Sunset, itself, outspent Van Ness in new car advertising during the seven month period prior to May, 1964; that only then did Van Ness increase its advertising expenditures beyond Sunset's; that such increased advertising did not lessen competition between Sunset and Van Ness (but may have increased it); that after May, 1964, Sunset still retailed more cars than Van Ness during 15 of 17 months of the remaining period with Sunset's new car sales rate actually increasing.

(5) There is, indeed, no evidence that anything done by Van Ness after about May, 1964, could possibly have caused or substantially contributed to the financial failure of Sunset; the evidence is wholly to the effect that Sunset's partners realized as early as February, 1964, that their business, as it was being conducted by them, was destined to financial failure; that, in fact, Sunset had run out of cash within the first six months of its operations.

(6) There is no evidence from which a jury might rationally infer that Chrysler, acting pursuant to an anti-competitive conspiracy, "forced" Sunset to take automobiles it did not want.

On the contrary, the evidence is wholly to the effect that in January, 1965, Chrysler shipped some cars to Sunset which Sunset had in writing actually ordered but which, according to partner Cornaglia, had been orally cancelled; that he complained of the delivery

but, nevertheless, continued to order cars at the rate of 65-70 a month through May, 1965; that on one other occasion, July, 1965, Chrysler shipped some cars, again on Sunset's written order, containing no directions as to delivery date; that again, according to partner Cornaglia, Sunset claimed that the order had been orally modified to provide different shipping dates; that, upon such claim, Chrysler tried to divert the shipment.

There is no evidence, however, that either of these delivery transactions arose out of any combination of defendants to restrain trade or that they were anything more than (at most) misunderstandings, or breaches of contractual arrangements, which either party, if feeling aggrieved, could have litigated as such.

(7) There is on evidence from which a jury might rationally infer that any combination of defendants, even if it could be found to have been unreasonably in restraint of trade, had any causal connection with the failure of Sunset's business.

The evidence, as above summarized, is wholly to the effect that the losses and failure of Sunset were caused, not by anti-competitive practices of Van Ness, but by an improvident method of operation deliberately adopted by the Sunset partners, including high pressure salesmanship and "fast track" methods without leaving in, or putting in, adequate capital to support that kind of operation while at the same time extracting from the business ample salary and ex-

pense draws,[1] the result being that the losses from such an operation were eventually thrust upon Sunset's creditors.

(8) Analysis of the record will demonstrate that, apart from failure to show causal connection between alleged anti-competitive practices of defendants and injury to Sunset's business, there is actually no substantial proof at all of loss to Sunset during the period 1964 and the first nine months of 1965 as compared with its selected test period September 1963—August 1964.

There is no substantial evidence from which a jury could rationally infer that Sunset sustained a loss of profits of $64,893, or any loss, during the calendar year 1964 and the first nine months of 1965 calculated on the basis of a claimed profit during its selected test period. The evidence is wholly to the effect that this claim of profit during the so-called test period was based upon an assumption that Sunset had received approximately $80,000 of so-called finance and insurance income which in fact it never did receive and eventually lost.

Further, the evidence is to the effect that Sunset suffered no loss of profits on new vehicles during 1964 and the first nine months of 1965; that its gross profit per new car remained about the same—1963—$349; 1964—$343; and 1965—$334; that in any

[1]On an investment that did not exceed $12,000 cash each, each Sunset partner drew out of the business $60,000 in salary, i.e., about $2,500 a month each, a total of $120,000, during a two year operation, plus a joint $400 a month expense account—an additional $9,600.

event any fluctuation was not due to any competitive practice of Van Ness.

Further, plaintiff's claim of loss during the year 1964 and the first nine months of 1965 included claimed loss, not only on new car sales, but also on used car sales. However, there is no substantial evidence from which a jury could have rationally concluded that any anti-competitive practice of defendants could have had any possible impact on Sunset's profits from sale of used cars; that in fact Sunset's profits on used cars rose steadily during 1964-1965.

Nor is there any substantial evidence from which the jury could have rationally inferred that Sunset, absent claimed anti-competitive practices of defendants, would have had a going concern value, i.e., a net worth of $60,107 in September 1965.

Reduced to its simplest terms, plaintiff's case rests entirely upon the claim that Chrysler's dual distribution system, involving an admittedly Chrysler owned Van Ness dealership admittedly subsidized by Chrysler resources, was in itself illegal—regardless of any actual anti-competitive intentions of defendants and regardless of any actual anti-competitive trade restraint practiced by Van Ness and regardless of any lack of causation between any such practices and Sunset's financial failure.

Plaintiff has, skillfully we believe, turned his premise into a jury verdict by reiteration of the argument that in any event Chrysler, a large manufacturer and distributor, is coldly interested in nothing else but

"market penetration,"[2] and that somehow Sunset, a comparatively small (but quite experienced) operation became a victim of this preoccupation of Chrysler with "market penetration."

Of course, all automobile manufacturers should be, indeed must be, concerned with "market penetration" if they are to survive in the market.

Conceivably this preoccupation might be carried to the extreme point at which an automobile manufacturer would indulge in anti-competitive schemes directed not only against other competing manufacturers and their dealers, but, as a last desperate, almost suicidal resort, even against its own dealers upon whose efforts it normally and largely depends to achieve its share of "market penetration."

However, in the opinion of this Court, no such extreme intention or scheme has been shown in this particular case where Sunset, having invited failure by its own choice of practices, seeks a windfall via the antitrust laws.

MEMORANDUM OF DECISION RE: ROBINSON-PATMAN ACT CLAIMS

SWEIGERT, J.:

Plaintiffs' claim of violation of the Robinson-Patman Act (15 U.S.C. Section 13(d) and (e))[1] arises

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[2]Plaintiff relies heavily, but, we believe, irrelevantly, on a bonus arrangement entered into in July, 1964 between Chrysler and its Van Ness manager.

[1]By stipulation of the parties, this issue has been submitted for decision by the Court.

out of an undisputed factual background showing that:

In June, 1962, upon the opening of the Van Ness Dodge dealership and about 15 months *before* Sunset came into existence, Chyrsler paid Van Ness $24,000 for its advertising expenses.

This payment was made in accordance with a non-contractual Chrysler policy of making such advertising payments on the occasion of new dealership openings or location movings.

In September, 1963, when Sunset became a new Chrysler dealer, Chrysler paid it $2,325 for advertising.

Plaintiff's contend that, if this payment to Sunset (based on Sunset's 400 vehicle sales estimate) had been made proportionately to the 1962 payment to Van Ness (based on a 600 vehicle sales estimate for Van Ness) it would have been $17,600.

Plaintiffs pray judgment for $15,250, the difference between $17,600, the amount Sunset should have been allowed, and $2,325, the amount it was actually allowed.[2]

Fowler v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), hold that the *amount* of the discrimination in prices or allowances between business competitors can be recovered as the direct damages resulting from violation

[2]The record shows that in November, 1965, 2 months *after* Sunset had gone out of business, Chrysler paid Van Ness $10,500 on the occasion of a Van Ness move to a new location; also that in April, 1966, when Ocean Dodge, a successor to the closed-out Sunset dealership, opened, Chrysler (based on a 700 vehicle estimate) paid it $13,530 for advertising.

of the Robinson-Patman Act, 15 U.S.C. Sections 13 and 15.

Section 13(d), supra, makes it unlawful for any person to make payments to a customer for any services or facilities furnished by or through such customer in connection with the handling of a product sold by such person *unless* such payment is available on proportionately equal terms to all other customers competing in the distribution of such product.

Similarly, Section 13(e), supra, it makes it unlawful for any person to discriminate in favor of one purchaser against another purchaser of a commodity bought for resale by furnishing any services or facilities connected with the handling of the commodity upon terms not afforded to all other customers on proportionately equal terms.

These sections have been considered in *F.T.C. v. Fred Meyer,* 390 U.S. 341 (1968), cited by plaintiffs here, and also in *Atalanta v. F.T.C.,* 258 F.2d 365 (2d Cir. 1958), cited by defendants.

Both cases recognize the purpose of these sections and apply the sections to the particular facts of those cases. Both cases, however, recognize that the sections apply only when the discrimination is made between customers competing in the distribution of the product.

Upon the evidence in the present case we find that the advertising allowances granted by Chrysler to Van Ness, having been granted either long *before* Sunset was even in business or *after* it had ceased

to exist, were not required to be granted proportionately to Sunset which was not at the time of the grants a customer of Chrysler competing in the distribution of its products.

Further, there is no evidence that the grant to Van Ness in 1962 was made with a view to discriminate between subsequent customers of Chrysler. Nor is there any evidence that said grant was intended to, or was in fact such as to, actually discriminate in favor of Van Ness as against Sunset or any other subsequent customer of Chyrsler.

Furthermore, the evidence is insufficient to show that the grant to Sunset in September, 1963 was, considering all factors involved, actually disproportionate to the earlier grant to Van Ness 15 months before.

It is hereby ordered that on plaintiffs' claims under the Robinson Patman Act, 15 U.S.C. Sections 13(d) and (e), judgment will be entered in favor of defendants.

Dated: August 13th, 1971.

/s/ W. T. Sweigert
W. T. Sweigert
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 71-2842

John M. England, Trustee in bankruptcy for Sunset Dodge,
Plaintiff-Appellant,
vs.
Chrysler Corp., et al.,
Defendant-Appellee.

[Filed Feb. 11, 1974]

Appeal for the United States District Court
for the Northern District of California

Before: WRIGHT and CHOY, Circuit Judges, and JAMESON,* District Judge.

CHOY, Circuit Judge:

John M. England, trustee for the bankrupt partnership, Sunset Dodge,[1] brought an antitrust action against Chrysler Corporation and two of its wholly-owned corporate subsidiaries—Chrysler Motors, its

*The Honorable William Jameson, United States District Judge for the district of Montana, sitting by designation.

[1]Appellant England will hereafter be referred to as Sunset Dodge or Sunset.

separate marketing entity, and Van Ness Dodge, a retail dealer located in San Francisco, California. The complaint charged the defendants with conspiring to restrain trade in violation of section 1 of the Sherman Act, 15 U.S.C. §1 (1970), and discrimination on the provision of promotional allowances in violation of sections 2(d) and (e) of the Robinson-Patman Act, 15 U.S.C. §§13(d) and (e) (1970). The Robinson-Patman claims were tried by stipulation to the court which held for Chrysler. The Sherman Act charge was tried before a jury which returned a verdict for Sunset with actual damages totalling $125,000. The district court then granted Chrysler's motions for judgment n.o.v. and, in the alternative, a new trial. Sunset appeals both the Robinson-Patman and Sherman Act rulings. We affirm.

In early 1962, a privately owned Dodge-franchised automobile dealer on Van Ness Avenue, San Francisco's "automobile row," notified Chrysler that it was terminating business. Chrysler considered it essential to have a Dodge dealer in the same location. After a search for a private investor proved unsuccessful, Chrysler established Van Ness Dodge on the location in May, 1962. Van Ness was organized under a Chrysler program whereby it was expected the appointed manager eventually could, largely out of profits, buy out the parent corporation's 100% interest in the dealership.

Chrysler anticipated that Van Ness would initially be a losing operation. Its forecast was correct, for Van Ness' losses were substantial, as had been its

predecessor's. These losses were subsidized by Chrysler.

Sunset was a privately-owned partnership formed as a Dodge dealer in September, 1963. Located within two and one half miles of Van Ness, it succeeded another unsuccessful Dodge dealer which had failed on the same site. Shortly after its establishment, Sunset as well encountered financial problems. After incurring large losses, it ceased its short-lived existence in August, 1965.

Robinson-Patman Act Claims

Chrysler had a program for contributing monies to help defray promotional costs whenever a new dealer opened for business or whenever an established dealer relocated. Pursuant to this program, Chrysler gave Van Ness $24,000 when it commenced business in June, 1962, Sunset Dodge $2,325 when it opened in September, 1963, and Van Ness $10,500 when it relocated in September, 1965. Sunset contends these payments were discriminatory under the Robinson-Patman Act.

Sections 2(d) and (e) of the Act prohibit the provision of "anything of value" or the "furnishing [of] any services or facilities," respectively, unless the thing of value, service, or facility is available on "proportionally equal terms" to, respectively, all other competing customers or all other purchasers.[2] As this

[2]Sections 2(d) & (e) of the Robinson-Patman Act, 15 U.S.C. §§13(d) & (e) (1970) provide:

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value

indicates, the advantaged and disadvantaged parties must be shown to be competing customers of the giver in order for there to be discrimination under this section. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Tri-Valley Packing Ass'n v. FTC*, 329 F. 2d 694, 708-09 (9th Cir. 1964).

Given this requirement, the promotional allowance to Van Ness in September, 1965 could not discriminate against Sunset since Sunset was then no longer in existence. It would be purposeless to condemn this allowance when it could have no conceivable competitive significance to Sunset.

The opening advertising outlays pose a somewhat different, but related problem concerning the competing customers requirement. To be subject to the Act, the disadvantaged recipients (or non-recipients) must be customers of the giver "within approximately the same period of time" as the award is made to the favored party. *Tri-Valley Packing Ass'n v. FTC*, *supra* at 708; *see Atalanta Trading Corp. v. FTC*, 258

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to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

F.2d 365, 371-72 (2d Cir. 1958); *Valley Plymouth v. Studebaker-Packard Corp.,* 219 F.Supp. 608, 610 (S. D. Cal. 1963); *Viviano Macaroni Corp.,* 73 F.T.C. 313 340-41 (1968); F. Rowe, Price Discrimination under the Robinson-Patman Act, §4.2 at 48-50, §13.10 at 391-92 (1962).[3] A "competing customer" is only one to whom an allowance *could* be offered at or near the time the allegedly discriminatory "thing of value" is given to the favored party. Where the allowances are awarded at the commencement of business, as in this case, the requirement means that both enterprises must have begun operations at reasonably contemporaneous times.

This requirement serves the purposes of the Act. It reflects the policy of the Act that a difference in the amount of the allowance should have some potential for injuring competition. Moreover, if disparate awards granted no matter how far apart in time could be subject to condemnation, the initial allowance would set the permanent level for future awards. Hence, the requirement that the favored and disfavored parties be competing customers at approximately the same time avoids pointlessly freezing the level of the allowances. *See Atalanta Trading Corp. v. FTC, supra* at 372.

It would stretch the imagination to conclude that Sunset and Van Ness were competing customers within the meaning of this term. Sunset was not estab-

[3]Some of these cases involve §2(a) of the Act. The contemporaneous requirement also applies under this section. *See* F. Rowe, Price Discrimination under the Robinson-Patman Act, §4.2 at 48-50 (1962).

lished until sixteen months after Van Ness's award. Moreover, the amounts were intended and, as far as the record shows, used for sendoff advertising which could have no more than a minimal persistent effect after the lapse of sixteen months. We, therefore, hold that there was no discrimination between Sunset and Van Ness as to the initial allowances because they were not competing customers at times reasonably contemporaneous with the more beneficial promotional award. *Compare Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 921 (5th Cir. 1962) *with Atalanta Trading Corp. v. FTC*, *supra* at 371-72.[4]

Sherman Act Claim

The theory of Sunset's action is somewhat unusual. It does not contend that Chrysler and its conspirators acted intentionally to put Sunset out of business or to usurp the retail market. Compare *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F.Supp. 453 (W.D. Pa. 1968), *aff'd on other grounds*, 417 F.2d 622 (3d Cir. 1969). Rather, it argues Chrysler operated Van Ness in a manner reckless of profit so as to create

[4]It is clear that the competing customers requirement is not satisfied where there is a time span of sixteen months between the awards. A close case may pose a more difficult problem. Because the reasonably contemporaneous standard is a vague one, there is a risk that results in such cases may be arbitrary. It may be appropriate, then, to apply a standard within a standard to rationalize these results. While the competitive effect of disparate allowances is normally irrelevant under §§2(d) & (e), *see FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959), there may be no other reasonable standard by which to reach intelligible results in these cases. Hence, it may be proper in such cases—for this limited purpose only—to determine if the discrepancy in the allowances has some impact upon the competitive conditions existing between the favored and disfavored parties.

intense pressure on Sunset to compete at a level that could not be profitable. The downward pressure on prices and terms of sale created by this would, it is argued, result in Van Ness and Sunset selling more of Chrysler's cars, thus attaining "market penetration" for Chrysler. The wholesale profits that would thereby be generated would outweigh the losses Chrysler would sustain at the retail level. Chrysler did not manage Van Ness with the specific intent to so "squeeze" Sunset, the argument concludes, but its deliberate overemphasis on wholesale sales, through the unreasonable operation of Van Ness, led inevitably to an impossible competitive situation and the consequent demise of Sunset.

It may well be that the predominant emphasis on market penetration, which results in the deliberately reckless operation of a subsidized retailer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade. *See Rea v. Ford Motor Co.*, 355 F.Supp. 842, 863-71 (W.D. Pa. 1972); *cf. Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1341-43 (9th Cir. 1970). For purposes of this appeal, that will be assumed. We find, however, that Sunset has not proved, by sufficient evidence,[5] that Chrysler's conduct was culpable under this legal theory.

[5]We are mindful of the trial judge's duty not to invade the province of the jury. Therefore, we have drawn all inferences favorably to Sunset and have tested the evidence by a standard asking whether reasonable men might find that the facts amounted to a Sherman Act violation. *See, e.g., Standard Oil v. Moore*, 251 F.2d 188, 198 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

Under Sunset's theory it is difficult to distinguish healthy from unhealthy competition, and mismanagement of a business from unreasonable, and therefore unlawful management. A business which through aggressive sales tactics intensifies competition is not to be lightly condemned. The competition it creates is not necessarily pernicious even if competitors are "harmed" since competition is always hard on the contestants. Indeed, that is its benefit. Nor should extravagant management of a business alone amount to an antitrust violation; otherwise many unsuccessful businesses might be subject to the antitrust laws. The market conditions which prevailed between Van Ness and Sunset could have been the product of healthy competition and the losses incurred by Van Ness the product of unintentional mismanagement. Or they could possibly have been the result of a policy to operate Van Ness without regard to profit in order to impel two-dealer market penetration. Since it is difficult to distinguish the two and since it is only the latter that we assume is condemnable, Sunset should be required to prove the conduct was deliberate to sustain its case.

To be deliberate does not mean there must be specific intent to produce the unreasonable economic effect (e.g., to "squeeze" Sunset). It means that there must be evidence from which it may at least be inferred that the conspirator determined upon the *course* of conduct, as opposed to the result.

In this context, Chrysler's conduct would be deliberate if it could be inferred that Chrysler determined

to manage Van Ness regardless of retail profit. Yet there is no proof this was the case. Sunset did not show that Chrysler was relatively less concerned with Van Ness' profitability than with its power to produce retail profits. Rather, all the evidence demonstrates that Chrysler wished the dealer to be successful. When, for example, Van Ness' selling practices appeared unwise—the same selling practices, discussed below, which Sunset points to as evidence of predatory conduct—Chrysler consistently attempted to correct them. Indeed, Sunset failed even to prove that it would be profitable for Chrysler to manage Van Ness at a loss because sales to Sunset and Van Ness would produce wholesale profits that would exceed that loss, proof which would support an inference the conduct was deliberate.

Despite these critical gaps in proof, it is possible that consistent predatory practices themselves might support the inference that Chrysler deliberately engaged in a policy of market penetration reckless of retail profit. Sunset relies on three practices which, it argues, establish that Van Ness was managed in such a manner.

First, Sunset points to two misdelivered shipments of automobiles as proof Chrysler wished to force cars on Sunset. Sunset had originally ordered the cars, but when the shipments were delayed, orally cancelled them. Nonetheless, they were delivered. While this is perhaps proof that Chrysler overzealously sold cars to Sunset, it is not germane to the supposed violation here: the reckless operation of Van Ness. To

say that Chrysler oversold automobiles to Sunset simply is irrelevant to a claim that Van Ness was managed without regard to profit.

Second, Sunset relies on Van Ness' supposedly excessive advertising expenditures as evidence of predatory management. From Sunset's organization in September, 1963 until April, 1964, each dealer spent an average of approximately $4,500 per month on new car advertising. In May, 1964 Van Ness' advertising expenditures rose substantially, and thereafter, consistently exceeded Sunset's, though after November, 1964 the amounts Van Ness spent moderated somewhat.

As to the pre-May, 1964 expenses, there is evidence that Sunset planned to spend less than it did, but that the Van Ness advertising appearing at the time Sunset opened forced the latter to meet the competition. Sunset did not show, however, that these early Van Ness expenditures were out of line with what Van Ness had spent prior to Sunset's entry into the market, or that they were greater than amounts spent by other San Francisco dealers. There is not much in this, therefore, that buttresses the jury's verdict.

The evidence of excessive advertising, then, consists essentially of the post-April, 1964 expenditures which were, it is true, unusually high. However, this increase did not occur until well after Sunset had entered the market. Moreover, the post-April level was much reduced after November, 1964 so that the period of clear excess was short-lived. It can hardly be said that these few months of profligate promo-

tional spending constitute substantial evidence supporting appellant's theory.

Third, Sunset contends that Van Ness sold automobiles on unreasonably low terms.[6] There is, however, no evidence that Van Ness engaged in these practices until at least the first quarter of 1964. Indeed, it is clear that Sunset, as its early advertisements indicated and as its repossession rate later confirmed, initiated the policy of selling of selling on marginal terms. And Sunset's selling prices were always less than Van Ness'.[7] To be sure, Van Ness began accepting thin deals after a time, but when the repossession rates first revealed this, Chrysler attempted to correct the practices. Even though Van Ness may have been guilty of ill-advised business policies, then, there is no substantial evidence its thin deals were the result of a deliberate and unreasonable emphasis on market penetration.

Our review of the record therefore confirms the trial court's assessment of the evidence. The district court's ruling on the motion for judgment n.o.v. is affirmed.

Affirmed.

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[6]"Low terms" consist of selling cars with low or no down payment, accepting questionable credit risks, accepting side notes for down payments, over-allowances on trade-ins, and the like. Such practices normally return to haunt the dealer because repossessions are later more likely to occur.

[7]Van Ness' retail profit per new car sold, the markup indicative of selling price, exceeded Sunset's by $33 in 1963, $38 in 1964, and $43 in 1965.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 71-2842

John M. England, Trustee in bankrupcy for Sunset Dodge,
Plaintiff-Appellant,
vs.
Chrysler Corp. et al.,
Defendant-Appellee.

[Filed May 2, 1974]

ORDER

Before: WRIGHT and CHOW, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*The Honorable William Jameson, United States District Judge for the district of Montana, sitting by designation.

Appendix D

United States District Court
Northern District of California

No. 48240 (WTS)

John M. England, Trustee in Bankruptcy, for Sunset Dodge, a Partnership Composed of Stanley Small and Steve Cornaglia,
Plaintiff,

vs.

Chrysler Corporation, Chrysler Motors Corporation, Van Ness Dodge, Inc.,
Defendants.

[Filed Aug. 31, 1971]

ORDER AND JUDGMENT RE PLAINTIFF'S SHERMAN ACT §1 CLAIM

This cause came on to be heard on defendants' motions herein to set aside the verdict and judgment herein and for an order directing judgment to be entered in accordance with their motion for a directed verdict heretofore made in this action or, in the alternative, for a new trial, and it appearing to the Court that the motion for a directed verdict should have been granted, pursuant to Rule 50(b) F.R.Civ.P.,

and that a new trial should be granted in the alternative, pursuant to Rule 50(c) F.R.Civ.P.,

IT IS ORDERED that the motion to set aside the verdict and judgment and for judgment in accordance with defendants' motions for a directed verdict be granted, and that judgment be entered for defendants dismissing the action with each party bearing its own costs.

It is further ordered that the motion for a new trial be granted, provided the order herein for judgment notwithstanding the verdict is reversed on appeal.

Dated: Aug 31 1971

W. T. Sweigert
United States District Judge

Appendix E

United States District Court
Northern District of California

No. 48240 (WTS)

John M. England, Trustee in Bankruptcy, for Sunset Dodge, a Partnership Composed of Stanley Small and Steve Cornaglia,
Plaintiff,

vs.

Chrysler Corporation, Chrysler Motors Corporation, Van Ness Dodge, Inc.,
Defendants.

[Filed Aug. 31, 1971]

JUDGMENT RE PLAINTIFF'S ROBINSON-PATMAN ACT §§2(d) and (e) (15 U.S.C. §§13(d) and (e)) CLAIM

This cause came on for trial on the stipulation of the parties that the claims of plaintiff under sections 2(d) and (e) of the Robinson-Patman Act (15 U.S.C. §§13(d) and (e)) should be tried and determined by the Court instead of the jury. Evidence both oral and documentary having been presented and the cause having been argued and submitted for decision and it

appearing to the Court that the claims of plaintiff under sections 2(d) and (e) of the Robinson-Patman Act (15 U.S.C. §§13(d) and (e)) are without merit,

It Is Ordered, Adjudged and Decreed that plaintiff take nothing by the allegations of his complaint concerning violations of the Robinson-Patman Act (15 U.S.C. §§ 13(d) and (e)) and that each party shall bear its own costs.

Dated, August 31, 1971.

W. T. Sweigert
United States District Judge